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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL JAMES MARCOSA,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 66A03-0506-CR-273
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE PULASKI CIRCUIT COURT
The Honorable Michael Shurn, Judge
Cause No. 66C01-0308-FC-7

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Michael James Marcosa appeals his conviction for Child Molesting,¹ a class C felony. Specifically, Marcosa argues that his conviction must be set aside because the State allegedly failed to bring him to trial within one year as required by Indiana Rule of Criminal Procedure 4(C). Additionally, Marcosa contends that he was denied the right to a fair trial because a State's witness improperly referenced his post-arrest silence and the trial court improperly commented about whether he would testify at trial. Finding no error, we affirm the judgment of the trial court.

FACTS

On August 9, 2003, thirteen-year-old T.D. was spending the weekend with a friend, A.B., and her family at a campground in Pulaski County. T.D. met Marcosa, a family acquaintance, for the first time at dinner that evening when he offered her some alcohol.

Later that evening when T.D. was getting ready for bed, Marcosa entered the camper and asked T.D. how old she was. After T.D. informed him that she was thirteen, Marcosa grabbed T.D. and began to caress her buttocks and one of her breasts. T.D. reported the incident to A.B.'s parents, and the police were contacted. Pulaski County Sheriff's Deputy John Rogers was dispatched to the campground, where T.D. told him that Marcosa had touched her breast and buttocks and made her drink alcohol. Deputy Rogers then walked over to Marcosa's camper. After Deputy Rogers handcuffed Marcosa and advised him of his rights, Marcosa agreed to give a statement. While Marcosa initially said that he had never seen T.D., he later told Deputy Roberts that he had talked to T.D. when he entered her camper to use the bathroom.

¹ Ind. Code § 35-42-4-3(b).

On August 11, 2003, the State charged Marcosa with child molesting as a class C felony, and a trial date was set for June 29, 2004. On that day, a twelve-person jury was selected. After the jurors were sworn in, the trial court ordered a recess. Thereafter, the State challenged one of the jurors for cause after the prosecutor learned that there were pending criminal charges against him. The trial court granted the challenge for cause and also granted Marcosa's subsequent motion for a mistrial because Marcosa refused to waive his right to a twelve-person jury.² The matter was then initially reset for a jury trial on August 2, 2004. However, because the prosecutor was scheduled to be on maternity leave during that time, the parties agreed to have the trial date reset. Marcosa indicated that he was waiving his rights under Indiana Criminal Rule 4(C) only to the extent that the trial would be set slightly outside the one-year limit prescribed under that rule. As a result, the trial court rescheduled the jury trial for September 27, 2004.

When the parties appeared for trial on that day, only thirty-two of the sixty prospective jurors in the venire reported for jury duty. A number of individuals had never been notified, others had been excused, several had moved, and one was deceased. As a result, Marcosa moved to dismiss the entire panel on the ground that he was being denied the right to be tried by a fair cross-section of the population. The trial court initially denied the motion because the trial was not actually scheduled to begin until two days later, and it was intended that the sheriff would summon an additional twenty-five people for jury trial and continue selection on the day of the trial. However, after several of the prospective jurors requested deferrals for valid reasons, the trial court ultimately dismissed the entire panel. As

² Marcosa had earlier waived the selection of an alternate juror.

a result, Marcosa's trial was reset for December 1, 2004. Marcosa objected to this setting because the date was outside the one-year limit set forth in Criminal Rule 4(C). The trial court overruled Marcosa's oral and written motions to dismiss.

At the jury trial that commenced on December 1, 2004, Deputy Rogers testified regarding his interview with Marcosa. After testifying about Marcosa's statements, Deputy Rogers commented that Marcosa eventually asked him "where's this going?," and asked for an attorney. Tr. p. 369. Deputy Rogers then testified that he stopped the interview at that point. Marcosa did not object to that testimony, and the State did not refer to Deputy Rogers's testimony regarding this issue during its closing argument.

At some point, the trial court explained to the jury that Marcosa would decide whether he would testify. The trial court informed the jurors that they would either be hearing additional evidence the following morning or that they would be receiving the case for deliberation. Following this comment, Marcosa moved for a mistrial and the trial court denied the motion. In the end, Marcosa was found guilty as charged and the trial court sentenced him to four years with all but 208 days suspended. He now appeals.

DISCUSSION AND DECISION

I. Alleged Criminal Rule 4(C) Violation

Marcosa first contends that the conviction cannot stand because the trial court failed to bring him to trial within one year after the charges had been filed. Specifically, Marcosa argues that such a violation under Criminal Rule 4(C) entitled him to a discharge.

In resolving this issue, we first note that the right to a speedy trial is guaranteed by the

Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Criminal Rule 4 help implement this right by establishing time deadlines by which a trial must be held. Collins v. State, 730 N.E.2d 181, 182 (Ind. Ct. App. 2000). Criminal Rule 4(C) provides in relevant part that:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

Crim. R. 4(C).

In construing this rule, this court has determined that “a defendant is ‘brought to trial’ within the meaning of the speedy trial rule when the jury is selected and sworn.” Lee v. State, 569 N.E.2d 717, 719 (Ind. Ct. App. 1991). Also, when a timely trial ends in a mistrial, the State is simply required to bring the defendant to retrial within a “reasonable” time. Brumfield v. Perry Cir. Ct., 426 N.E.2d 692, 695 (Ind. 1981). It is within the trial court discretion to determine what constitutes a reasonable time. Id.

In this case, Marcosa was charged with the offense on August 11, 2003. Appellant’s App. p. 1. A jury was selected and sworn on June 29, 2004. Id. at 90-91. Thus, for purposes of Criminal Rule 4, Marcosa was brought to trial in a timely fashion in June 2004. Also, as

noted above, Marcosa requested and received a mistrial after a member of the jury was subsequently dismissed for cause, which necessarily implies that the trial had already commenced. Thus, the only remaining question is whether the State brought Marcosa to trial within a “reasonable time” after June 29, 2004.

As noted above, Marcosa’s retrial began on December 1, 2004, which was only five months after the mistrial had been declared. Appellant’s App. p. 11. Moreover, the trial court attempted to set two earlier trial dates in this case. Specifically, Marcosa’s retrial was originally scheduled for August 2, 2004, but the elected prosecutor who had managed the case throughout the proceedings was scheduled to be on maternity leave at that time. Thus, the deputy prosecutor who was assigned to a different court would have had to rearrange his or her schedule to try Marcosa’s case or a deputy prosecutor would have to be retained. Tr. p. 26, 29. In light of these circumstances, the parties agreed to push the retrial back to September 27, 2004. Id. at 30-31. However, the attempt to retry Marcosa on that day was foiled when nearly half of the jury venire failed to appear for jury duty and Marcosa moved to have the entire panel dismissed. Id. at 34-36, 39-49, 50-52, 79-81. In deciding to dismiss the panel, the trial court recognized that even if the jury selection was postponed only for a few days, enough additional prospective jurors could not be summoned in a timely fashion in order to select a fair jury. Hence, in light of the complications in this case stemming from the prosecutor’s maternity leave and the lack of sufficient prospective jurors for the September 27, 2004, trial date, we conclude that the five-month delay in bringing Marcosa’s case to a retrial was reasonable. See O’Neill v. State, 597 N.E.2d 379, 382 (Ind. Ct. App. 1992)

(holding that a six-month delay between a mistrial and retrial was reasonable where the court vacated the first retrial date because of court congestion and the defendant failed to provide any facts suggesting that the four month delay after that point was not due to court congestion or was unreasonable).

Also, apart from the fact that Marcosa was brought to trial within a reasonable period of time after the mistrial, we note that, according to Criminal Rule 4(C), delays do not count against the State when they occur at the defendant's request, are caused by his act, or are caused by court congestion or emergencies. Here, after the June mistrial was declared, the trial court reset the trial date for August 2, 2004, which was still within the one-year period. At that point, Marcosa expressly waived his rights under Criminal Rule 4 to the extent that he agreed to have the retrial reset for September 27. Because Marcosa acquiesced to the delay between the August and September trial dates, that time period is charged to him and does not count against the period prescribed in the rule. See Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999). Thus, as of the September trial date, there was no Criminal Rule 4 violation.

Moreover, the delay between the September and December trial dates does not count against the period set forth in the rule in light of the court emergency—the absence of potential jurors. Criminal Rule 4(C) expressly provides that a period of delay caused by court congestion or an emergency does not amount to a delay for purposes of the rule. Additionally, our Supreme Court has held that “any exigent circumstances may warrant a reasonable delay beyond the limitations of” Criminal Rule 4 and that the “unavailability of

essential personnel or physical facilities” constitutes one such exigent circumstance. Loyd v. State, 272 Ind. 404, 409, 398 N.E.2d 1260, 1265 (1980). While the State attempted to retry Marcosa on September 27, it was thwarted by the lack of prospective jurors reporting for jury service, which led Marcosa to move for the dismissal of the entire panel and the court to ultimately grant that motion. That said, it was not possible for the State to retry Marcosa on that date because of the lack of potential jurors. For all of these reasons, Marcosa’s motion for discharge was properly denied.

II. Post-Arrest Silence

Marcosa next maintains that his conviction must be reversed because of the State’s reference to his post-arrest silence at trial coupled with the trial court’s extraneous comments about his decision about whether or not to testify. Although Marcosa did not object to these alleged improper comments, he claims that the reference to his post-arrest silence amounted to fundamental error.

In resolving this issue, we first note that it is impermissible for the State during trial to comment upon a defendant’s post-arrest silence. Monegan v. State, 721 N.E.2d 243, 254 (Ind. 1999). In Doyle v. Ohio, 426 U.S. 610, 619 (1976), the United States Supreme Court held that “the use for impeachment purposes of petitioner’s silence, at the time of arrest and after receiving Miranda warnings violate the Due Process Clause of the Fourteenth Amendment.” Because the Miranda warnings implicitly assure an individual that his silence will carry no penalty, a violation of due process occurs if a defendant’s post-arrest silence is subsequently used against him for impeachment purposes at trial. Francis v. State, 758

N.E.2d 528, 531 (Ind. 2001). A violation of this rule occurs when the State is permitted to impeach a defendant with his prior silence or is permitted to call attention to the defendant's earlier silence. Ortiz v. State, 716 N.E.2d 345, 349 (Ind. 1999).

At the outset, the record reflects—and Marcosa acknowledges—that he did not object at trial to Deputy Rogers's comment that he stopped interviewing Marcosa after Marcosa made a request for counsel. Thus, Marcosa has waived the issue. Hyppolite v. State, 774 N.E.2d 584, 594-95 (Ind. Ct. App. 2002) (holding that the failure to object to an alleged error waives that error on appeal). However, in an effort to avoid waiver, Marcosa maintains that the comments made with regard to his post-arrest silence rose to the level of fundamental error.

The fundamental error exception is extremely narrow. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). Fundamental error occurs only when the error “constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Id. Put another way, to qualify as fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Clay v. State, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). In determining whether a defendant is entitled to a reversal based on a comment about his post-arrest silence, we will consider: 1) the use to which the prosecution puts the post-arrest silence; 2) who elected to pursue the line of questioning; 3) the quantum of other evidence indicative of guilt; 4) the intensity and frequency of the reference; and 5) the availability to the trial judge of an opportunity to take curative measures. Robinette v. State, 741 N.E.2d 1162, 1165 (Ind.

2001).

Turning to the circumstances here, the record reflects that Deputy Rogers made only one brief reference to the fact that Marcosa terminated the questioning and requested an attorney. Tr. p. 370. Moreover, the State made no attempt to use that testimony as evidence of Marcosa's guilt and the prosecutor did not refer to Marcosa's request during closing argument. Id. at 410-19, 435-38. This isolated comment by Deputy Rogers constituted the sole reference to Marcosa's post-arrest silence during the three-day trial. Moreover, the jury instructions mitigated any prejudice to Marcosa as a result of Deputy Rogers's testimony. Specifically, both the preliminary and final instructions provided that Marcosa was not required to present any evidence, prove his innocence, or explain anything. Appellant's App. p. 175, 313. The jury was instructed several times that the State has the burden of proving Marcosa's guilt beyond a reasonable doubt, and it was informed that Marcosa's arrest and criminal charge were not evidence of his guilt. Id. at 174-77, 313, 315. Finally, the jury was instructed that Marcosa had no obligation to testify and that the jury was not permitted to consider the fact that he did not testify. Id. at 321.

In light of these circumstances, we cannot say that any alleged error regarding a comment on Marcosa's post-arrest silence constituted fundamental error. Marcosa has made no showing of prejudice to the extent that an isolated reference to his post-arrest silence rendered a fair trial impossible. See Clay, 766 N.E.2d at 36.

Finally, we reject Marcosa's argument that the trial court's comment to the jury that Marcosa was deciding whether to testify amounted to an improper comment on his post-

arrest silence. The record reflects that after the State rested its case at 2:30 p.m., the trial court called a recess and, out of the jury's presence, asked defense counsel to consult with his client as to whether he would be testifying. Tr. p. 381-85. The trial court then explained to the jury that Marcosa would decide that evening whether to testify and that the jurors would either hear additional testimony or be deliberating the following morning. Id. at 389-90. In essence, Marcosa has failed to show that the trial judge's comments were improper. No incorrect information was contained in his comments, and there was no implication of prejudice about whether Marcosa would testify. Thus, Marcosa's claim of fundamental error fails.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.